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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 512-514

ELDON WILLIAMS, FRANK E. THOMAS AND ERVIN S. NEIS, PETITIONERS,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Eldon Williams, Frank E. Thomas and Ervin S. Neis, respectfully petition this Court to

grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court for review the record of the case therein lately pending of the consolidated cases of Eldon Williams, Frank E. Thomas and Ervin S. Neis versus the Atchison, Topeka and Santa Fe Railway Company, a corporation, being respectively cases numbers 40144, 40145 and 40143 on the docket of that Court.

Summary Statement of the Matter Involved.

This petition for writ of certiorari in these consolidated cases challenges:

(a) The right, power and authority of a union bargaining agent, without other authority than that of a bargaining agent, to represent an employee in a dispute between the employer and employee with respect to contractual seniority rights theretofore created and established by such employee and the right, power and authority of such union acting jointly with the employer to act retroactively with respect to such seniority rights all without the knowledge or consent of the employee.

(b) The right, power and authority of a labor union to file a grievance protest as the representative of one employee and at the meeting called to consider such protest, also to represent the employee against whom such protest is filed without authority from the employee so affected or without being chosen by such employee as his representative when such employee so affected has not been notified of such grievance protest or of said meeting, knows nothing thereof, is not afforded an opportunity to be present or heard at such meeting in person or by a representative of his choice.

(c) The right, power and authority of a labor union and an employer, at a meeting called to consider a griev-

ance protest filed by the union on behalf of one employee *under* a "recognized interpretation" of the bargaining contract, to disregard and fail to consider or decide the grievance protest, but instead to arbitrarily and discriminatorily decide an entirely different matter, namely —to decide to take away and destroy another employee's theretofore established seniority rights and status without notice to or the knowledge of such other employee so deprived thereof, without affording such other employee an opportunity to be present and be heard, without allowing such other employee to select a representative of his choice, and when such other employee so deprived has presented no grievance or other question to such meeting.

(d) The right, power and authority of a labor union as bargaining agent and the employer to meet and temporarily ignore and disregard a "recognized interpretation" of the bargaining contract and the contract itself for the purpose of taking away and destroying an employee's seniority status and rights and upon so doing, then to immediately re-instate such "recognized interpretation" and contract for all purposes and to treat such "recognized interpretation" and contract so re-instated as effective both before and after such action, all without notice to or the knowledge of the affected employee who learns thereof only when the agreement to take such seniority rights so made is put into effect and the employee so deprived has not been afforded an opportunity to be present or heard in person or by a representative of his choice.

(e) The right and power of the bargaining agent and the employer to arbitrarily and retroactively take from an employee his theretofore established seniority rights by an oral agreement made at a meeting held without

notice to or the knowledge of the employee affected, without granting such employee a hearing and without hearing any authorized representative selected by such employee, which oral agreement unfairly discriminates against such employee.

(f) The right, power and authority of a union bargaining agent to assert or create an alleged dispute questioning an employee's individual seniority status theretofore established, thereupon to assume to act as such employee's representative, and thereafter to agree with the employer to arbitrarily, discriminatorily and retroactively take such employee's seniority rights from him, all without the knowledge of or notice to such employee of the existence of any such dispute, and without giving such employee an opportunity to appear and be heard in person or by a representative of his own selection, and where the employee first learns of the destruction of his seniority rights only after being deprived thereof.

(g) The ruling of the Missouri Supreme Court to the effect that when the National Railroad Adjustment Board, upon examination of petitioners' joint notice of intent to file their claims, ruled that such notice showed that the Union bargaining agent and respondent railway were in agreement and therefore no dispute existed between the parties to the bargaining contract (R. 140-148) and under such circumstance said Board had no jurisdiction to hear individual employees' complaints, that such a ruling was a decision against petitioners which was binding on them and deprived them of the right to litigate their claims in court.

(h) The lawfulness and constitutionality of the action of the union bargaining agent and respondent railway under the circumstances here present and for all of

the reasons herein set forth, in retroactively taking from petitioners their established contractual seniority rights, without notice to them, without their knowledge, without opportunity to be heard, and without representation, at an informal meeting *not* called for that purpose but called to consider another employee's grievance protest, which protest was not there considered or determined, but at which meeting said bargaining agent and respondent railway arbitrarily and discriminatorily decided to take away petitioners' seniority rights, the petitioners herein contending that such action deprived them of their property without due process of law as guaranteed to them by the Fifth Amendment of the Constitution of the United States.

This petition involves three suits seeking damages for violation of petitioners' seniority rights as locomotive firemen on respondent railway, which suits were commenced in the Circuit Court of Jackson County, Missouri (Rec. 126, 127). The suits were consolidated for trial and were presented to the trial court without a jury on a stipulation and agreed facts (Rec. 93-183) offered jointly by petitioners and respondent (Rec. 86-90-93) and on oral evidence offered by petitioners. Judgments were rendered in favor of respondent in each case by the trial court, whereupon petitioners filed timely motions for new trial and appeals to the Supreme Court of Missouri. Each case involves an agreed amount of damage to each petitioner of $7,525, exclusive of costs, such damage resulting from loss of employment on account of change in their respective seniority dates (Rec. 160, 231, 233, 299, 318). The appeals were consolidated by order of the Missouri Supreme Court (Rec. 51). Such Court, which is the state court of last resort, in Division No. 2 thereof, affirmed the judgment in favor of respondent railway, decided the consolidated cases adversely to petitioners (Rec. 337-345) and on October 13, 1947, denied petitioners' motion for

re-hearing and motion to transfer the consolidated cases to the court *en banc* (Rec. 366). This exhausted all remedy of petitioners in the state court. The constitutional question here presented was raised in the petition so filed (Rec. 17, Par. 26) has been urged at all stages and has been ruled adversely to petitioners as shown by the opinion of the Missouri Supreme Court (Rec. 341, 343).

The facts are that petitioners had long been employed as railroad firemen on the Panhandle Division of respondent railway (Rec. 102, 103, 184, 185). When each began service on the Pecos Division, another division of respondent railway, they were furloughed men out of service and cut off the "Board" on the Panhandle Division (Rec. 102, 185) and had been given their discharge checks (Rec. 186-190). Each entered service on the Pecos Division in the fall of 1936 and was given a seniority date as of his first run on that Division. Petitioner Williams was first and established October 17, 1936, as his seniority date on that division (Rec. 104, 194, 200, 291, 304). There was considerable dispute and misunderstanding as to what was a "hired" and what was a "borrowed" man and whether certain individuals had seniority rights under Schedule Articles XI or XVII (Rec. 73). Their status as "hired" men on the Pecos Division, which involves their seniority rights thereon, was not questioned until May, 1937, and then for the first time Union's General Chairman Keiser questioned their status and thus their seniority on the Pecos Division by raising the issue with respondent's General Managers (Ex. 7, Rec. 109) in writing by letter as required by Schedule Article XVIII(a) (Rec. 98, 99), and the agreement resulting therefrom established the "recognized interpretation" placed on the bargaining contract mentioned in the second paragraph of Schedule Article II (Rec. 95). The correspondence between Union's

General Chairman Keiser and respondent's General Managers resulted in the "recognized interpretation" that petitioners and all other firemen similarly situated were "hired" and not "borrowed" men on the division where rendering service when cut off of their home division and that petitioners were entitled to their respective 1936 seniority dates on the Pecos Division (Exs. 7-16, Rec. 109-117).

The seniority rights of which petitioners were deprived are fixed by contract between the Brotherhood Union and respondent railway, such contract being known as the "Schedule" (Rec. 72, 73).

Bearing upon the issue here presented is the question whether petitioners are "hired" or "borrowed" firemen on the Pecos Division of respondent railway. As "hired" firemen, Schedule Article XI(a)-(w), which applies to "hired" men only (Rec. 73, 95-97) provides that firemen shall rank on the firemen's roster from the date of their first service as firemen, which means that the first pay run on such division establishes the seniority date (Rec. 194, 200). As "borrowed" firemen, which term is the same as "transferred" (meaning from one division of respondent railway to another), Schedule Article XVII(d)-(e) (Rec. 98) which applies to "borrowed" men only (Rec. 73), required that "borrowed" firemen may elect to remain on the new division of the railway within six months after their first pay run thereon if they desire to make their employment thereon permanent and also provided that such firemen shall have seniority from the date of such first pay run and continuing thereafter for six months unless their employment on the new division becomes permanent by such an election, in which event the seniority shall be continuous from the date of its establishment, that is from their first run on the division. Schedule Article XVIII(a) (Rec. 98, 99) provides that in

case of a difference of opinion as to the construction of the Schedule a written statement of the questions at issue must be submitted to respondent's General Managers for construction.

After Union's General Chairman Keiser raised the issue and challenged petitioners' status as "hired" men and thus their seniority rights, claiming that the correct consideration of Schedule Article XVII placed petitioners in the category of "borrowed" firemen and not that of "hired" firemen on the Pecos Division (Ex. 7, Rec. 109) there followed an exchange of correspondence between said General Chairman and respondent's General Managers within the purview of Schedule Article XVIII(a) and a "recognized interpretation" was established on September 13, 1937, to the effect that petitioners and all such firemen were "hired" men, would be accorded seniority rights as such, and where denied such rights respondent would make proper amends (Exs. 8-16, Rec. 110-117). Respondent acted upon this interpretation (Rec. 73) and on September 23, 1937, ordered petitioner Williams to work on the Pecos Division under the theretofore established October 17, 1936, seniority date (Ex. 18, Rec. 118), but incident thereto required petitioner to forfeit his long standing seniority on the Panhandle Division (Ex. 21, Rec. 119), (102, 103, 184, 185, 201, 202, 205, 206) which relinquishment continued in effect until November 9, 1937 (Exs. 21, 22, 23, 24, 25—Rec. 119-126). The other petitioners were similarly ordered to work on the Pecos Division under their theretofore established 1936 seniority dates and the rights of each by stipulation are agreed to be the same (Rec. 51, 54, 57, 58, 297, 3[illegible].

Petitioner William[illegible]ed for work and began work on the Pecos Division[illegible]spondent railway on September 29, 1937 (Rec. 201). The other petitioners likewise reported to work on other dates, all petitioners being

entitled to work and service on the Pecos Division by reason of and under their established 1936 seniority dates (Ex. A—Rec. 182, Ex. 23—Rec. 121, 122).

The same day (September 29, 1937) Union's Local Chairman Eastham claiming that petitioner Williams was a "borrowed" and not a "hired" man and notwithstanding said "recognized interpretation" made on September 13, 1937, filed a grievance protest on behalf of Paul Sellars, a fireman with seniority junior to petitioner's seniority, but nevertheless, protesting against petitioner Williams being permitted to work on the Pecos Division under his 1936 seniority date and contending that Sellars is entitled to full pay until petitioner Williams is "taken off" (Ex. 22—Rec. 120-121). The second paragraph of Schedule Article II (Rec. 96) authorizes the union to handle a fireman's grievance *under* the "recognized interpretation" placed upon the schedule by the officials of the Company and the General Committee. No provision of the bargaining contract (schedule) authorizes the union to represent the employee against whom it files a grievance protest on behalf of another employee. Petitioner Williams did not know that the Sellars grievance protest had been filed and was not told thereof (Rec. 125, 207, 209, 224, 204, 205).

Respondent's Master Mechanic for the Pecos Division rejected this grievance protest advising Union's Local Chairman Eastham that petitioner Williams had established a 1936 seniority date on the Pecos Division which was senior to the seniority dates held by Sellars and other junior firemen (Ex. 23—Rec. 121). Whereupon, Union's Local Chairman Eastham referred the Sellars grievance protest to Union's General Chairman Keiser (Rec. 122) who pressed the Sellars grievance protest (Rec. 112-125) which resulted in a meeting to hear and determine such grievance protest at Amarillo, Texas, on October 28, 1937 (Resp. Ans., Rec. 42, 43), at which re-

spondent's General Managers were present for respondent and Union's General Chairman Keiser and Local Chairman Eastham were present on behalf of Sellars (Rec. 125). None of petitioners knew or were notified of the meeting, none were present at the meeting, and none were represented at the meeting (Rec. 125, 207). Respondent says "there was no reason why they should have been notified" (Resp. Opening Statement, Rec. 78).

The Sellars grievance protest *under* the aforesaid "recognized interpretation" of the bargaining contract was not decided at this meeting although it was called for that purpose, but instead the Union and respondent railway decided another matter, namely to take from Williams and the other petitioners their 1936 seniority rights —the dis-establishment of petitioners' said seniority rights and the violation of their property rights without their knowledge, notice or a hearing, in contravention of the Fifth Amendment to the Constitution. At this meeting respondent's General Managers asked Local Chairman Eastham what "he wanted" and Eastham informed them that he "did not want those Panhandle Division men out there" (Ex. 39, Rec. 151). Said General Managers contended that petitioners were "hired" men on the Pecos Division and that said Local and General Chairmen could not construe it any other way (Rec. 229, 230). Then Local Chairman Eastham and General Chairman Keiser withdrew from the meeting, went out into the hall for 15 or 20 minutes and came back to the meeting with an agreement they had reached in the hall that petitioners' 1936 seniority dates would be taken from them and they would be given a 1937 seniority date (Rec. 230). Respondent's General Managers still contended that petitioners were "hired" men and that respondent couldn't consider it any other way, but stated that respondent would go along with them on their agreement saying "If

that is the way you fellows want it, I will go along with you" (Rec. 230, 298, 316, 317). The decision reached at this meeting was informal and oral (Rec. 209). Such oral understanding violated Schedule Article XVIII(a) and the agreed "recognized interpretation" previously made in writing; said oral understanding was not of general application to respondent's entire railway system, but was limited to the Pecos Division, was limited to the period from October 17, 1936, to October 28, 1937, was temporary in application, and was that furloughed firemen who began service on the Pecos Division of respondent railway between October 17, 1936, and October 28, 1937 (which period begins with petitioner Williams' seniority date on the Pecos Division and covered the seniority dates of all petitioners thereon), would have their seniority dates taken from them as though "borrowed" men, but from the date of the meeting (October 28, 1937) and thereafter furloughed firemen entering service on the Pecos Division (rendering exactly the same form of services as petitioners had), would again be considered "hired" men as required by said "recognized interpretation" and would establish seniority thereon with their first service run (Ex. 29, Rec. 132, 133, 172). Petitioners first learned of the meeting of October 28, 1937, and that their respective seniority dates were taken away thereat when respondent's chief clerk informed them of the lost seniority (Rec. 204, 205, 207, 209, 237, 238). The wording of the Schedule was not modified, amended or changed by the contracting parties. It remained the same. The oral agreement to breach or destroy petitioners' seniority rights made at such meeting, was a temporary expedient only and is the breach and violation of which petitioners complain. Petitioners contend that in view of the guarantees of the Fifth Amendment to the Constitution of the United States, it is impossible for the

provisions of the schedule to mean one thing from 1925 (the date of such contract) to October 17, 1936, then mean something entirely different from October 17, 1936, to October 28, 1937, and from then on to mean what it had meant prior thereto from the beginning. Looking through form to substance, the informal, oral agreement purposely but temporarily ignored the written "Schedule," its provisions, and the "recognized interpretation" thereof in violation of petitioners' rights and damaged each petitioner through loss of employment in the agreed amount of $7,525 (Rec. 160).

Such destruction of their seniority rights by this oral agreement was without notice to or knowledge of petitioners, without opportunity in them to be present or heard, without affording petitioners the right and opportunity to be represented.

Petitioners protested to respondent's officials, respondent's President, Union's Executive Committee, Union's President without avail (Rec. 127, 218, 135, 148, 152-154, 157, 215-231, 276, 277, 296, 299). They attempted to present an *ex parte* submission of their claims to the National Railroad Adjustment Board, which Board refused to consider any individual claim of petitioners because there was no dispute between the parties to the bargaining contract (respondent and the Brotherhood Union). There being no dispute between such parties the Board refused to take jurisdiction and closed its files (Rec. 138-148). Petitioners then sought relief in the Circuit Court of Jackson County, Missouri, against Respondent railway as before stated, which relief was denied.

Jurisdiction.

Jurisdiction is conferred upon this Court to review these consolidated causes by writ of certiorari under Sec-

tion 237 (b) of the Judicial Code as amended by the Act of February 13, 1935, Chapter 229, 43 Stat. 936, 937; 28 U. S. C. A., Sec. 344.

Reason for Granting the Writ.

The discretionary power of this Court to grant the writ of certiorari under Section 237 (b) of the Judicial Code is urged and invoked for the reason that a contract right protected by the guarantee of the Fifth Amendment of the Constitution of the United States is claimed by petitioners and such right has been retroactively destroyed by respondent contrary to the guarantees of such constitutional provision, and for the further reason that the Supreme Court of the State of Missouri has decided a federal question of substance in a way not in accord with applicable decisions of this Court. Such decision, adverse to petitioners, became final on October 13, 1947, upon the refusal of that Court to grant a rehearing and to transfer the consolidated causes to the court *en banc*. The decision is reported as *Williams et al.* v. *Atchison, Topeka & Santa Fe Railway Company*, 204 S. W. 2d 693 (not yet officially reported in Missouri reports).

The decision of the Supreme Court of Missouri disregards a contract right of petitioners and violates due process of law guaranteed to petitioners by the Fifth Amendment of the Constitution of the United States as decided by this Court in *Elgin, J. & E. Railway Company* v. *Burley*, 325 U. S. 711, 65 S. C. 1282; *Steele* v. *Louisville and N. Ry. Co.*, 323 U. S. 192, 65 S. C. 226; *Nord et al.* v. *Griffin*, 86 F. 2d 481, Cert. Denied this Court 300 U. S. 673, 57 S. C. 612. Such decisions hold that seniority is a property right within the protection of the Fifth Amendment of the Constitution of the United States which may not be retroactively taken from petitioners or destroyed under the circumstances here present and that the issues

here present involve a Federal Statute and a Federal question and policy.

The decision of the Supreme Court of Missouri is not in accord with the decisions of this Court in *Elgin, J. & E. Railway Company* v. *Burley,* 325 U. S. 711, 65 S. C. 1282; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210, 65 S. C. 235, and *Nord et al.* v. *Griffin,* 86 F. 2d 481, Cert. Denied this Court 300 U. S. 673, 57 S. C. 612. These decisions hold that the action of respondent in retroactively destroying petitioners' seniority rights at a hearing of which petitioners were not notified, at which petitioners were not present, at which petitioners had no representation and of which petitioners had no knowledge, denies to the petitioners due process of law as guaranteed to them within the meaning of the Fifth Amendment to the Constitution of the United States. Such decisions further hold that even though petitioners protested to the respondent and the Brotherhood through regular procedural steps, such protest and hearing thereon did not afford due process or cure the lack of due process resulting from the manner in which petitioners lost their seniority rights.

The question presented is of grave public importance because, if the decision of the Supreme Court of Missouri is permitted to stand, its effect will be to enable railroads and brotherhoods of railroad employees, other employers and union bargaining agents of their employees, to agree informally among themselves without notice to or the knowledge of the employees and without affording them an opportunity for hearing to arbitrarily discriminate against such employees and to retroactively destroy the established contract seniority rights of individual members of the railroad or other crafts, at their will, for no cause, or solely for the purpose of going along with the union, or merely because the union requests the company

to ignore such seniority rights, or because of the employer's desire to please union (For illustration see *Piercy* v. *L. & N. Ry.*, 198 Ky. 477, 248 S. W. 1042). If the principles upon which the Supreme Court of Missouri decided these consolidated causes are correct, employees' seniority rights on all railroads and the seniority rights of the members of all other brotherhoods or unions are in jeopardy and such seniority rights established by contracts between railroads and brotherhoods or between other employers and union bargaining agents are not the property of the individual employees on whose behalf the contract was made, but are subject to the whim of the railroads and brotherhoods or other employers and bargaining agents as they may agree among themselves. Such a state of law encourages strikes of individual railroad employees, strikes of groups of such employees whose seniority rights have thus been destroyed, and can only result in impaired operation and inefficiency of railroads and other business so affected by strikes, restlessness and dissatisfaction of employees.

The discretionary power of this Court to grant the writ is further urged and invoked for the reason that the decision of the Supreme Court of Missouri holds that the action of the National Railroad Adjustment Board in refusing to take jurisdiction of the complaint of an individual railroad employee made without and independently of his bargaining agent, acts as an adjudication on the merits of such employee's complaint, is final and binding on such employee, and precludes relief to such employee by the courts.

Such decision is not in accord with, but is contrary to the decisions of this Court in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 711, 65 S. C. 226, and *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 65 S. C. 1282. These decisions hold and recognize that the National Railroad Adjustment

Board considers only disputes between railroads and brotherhoods as parties to the bargaining contract and that it refuses to take jurisdiction of disputes or grievances by an individual employee unsupported by the organization or brotherhood, which nominally represents him as collective bargaining agent, and that the refusal by the Board to take jurisdiction of the individual employee's grievance or dispute with the railroad is not an adjudication of such complaint and is not final and binding upon the individual employee and does not bar relief by the courts.

If the decision of the Missouri Supreme Court in holding (Rec. 344) "that Williams, having participated in the proceedings until final disposition and then having presented his claim to the National Railroad Adjustment Board, which Board decided against him, cannot now litigate the same questions in the courts" is permitted to stand, such decision will authorize and enable the brotherhood bargaining agent to refuse to support the individual member attempting to present his grievance to such Board and so bar such individual employee from ever asserting his right either before the Board or in the courts and thus effectively deprive such individual employee not only of due process of law but of any process of law, and effectively bar him from an adjudication on the merits of his grievance. Such decision by the Supreme Court of Missouri gives to the Board, the brotherhoods and the railroads, the autonomous, totalitarian and autocratic power to destroy and trample the rights of individual members of the railroad crafts and bar them from relief in the courts.

The decision of the Supreme Court of Missouri is contrary to the decided law of this Court on an important federal question as ruled in the Burley, Steele and Tunstall cases to the effect that refusal of jurisdiction by the National Railroad Adjustment Board is not an adjudication and does not bar relief in the courts.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued to the Supreme Court of the State of Missouri to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Supreme Court of the State of Missouri be reversed upon the grounds and for the reasons hereinabove stated.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

ELDON WILLIAMS, FRANK E. THOMAS AND ERVIN S. NEIS, PETITIONERS,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court of Missouri.

The judgment of the Supreme Court of Missouri and the opinion of that Court was filed on September 8, 1947, and made final as an opinion of a state court of last resort by the denial of a motion for rehearing and refusal to transfer to the court *en banc*, both entered on October 13, 1947. The opinion of the Supreme Court of Missouri, found

at pages 337 to 345 of the record, is reported at 204 S. W. 693 (not yet officially reported in Missouri Supreme Court reports).

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1935, Chapter 229, 43 Stat. 936, 937; 28 U. S. C. A., Sec. 344.

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary Statement of the Matter Involved," to which reference is hereby made.

IV.

Specifications of Error.

(1) The Supreme Court of Missouri erred in holding that petitioners had not been deprived of their seniority property rights without due process of law, contrary to the guarantees of the Fifth Amendment of the Constitution of the United States, for the reason that:

(a) Such seniority rights of petitioners on the Pecos Division established in 1936 had been acted upon and recognized by respondent, and were arbitrarily and retroactively taken from petitioners without the knowledge of or notice to petitioners, thereby damaging petitioners through the loss of employment in the agreed amount of $7,525 to each and unfairly discriminating against petitioners.

(b) Such seniority rights of petitioners were destroyed and taken from petitioners at an informal meeting

called on October 28, 1937, to hear the grievance protest of Paul Sellars, a third party fireman, which protest was not then or there determined but instead petitioners' 1936 seniority rights on the Pecos Division were then and there taken from them retroactively without the knowledge of or notice to petitioners, without their being represented thereat and without representation or opportunity being afforded them to be heard in defense of their rights by an oral agreement which discriminated against petitioners.

(2) The Supreme Court of Missouri erred on a federal question of substance in its interpretation of the provisions of the Railway Labor Act, and in holding that petitioners as individuals, having attempted to present their dispute and claim to the National Railroad Adjustment Board, which Board refused to take jurisdiction, cannot now litigate the question or assert their rights in court.

V.

Argument.

(1) The Supreme Court of Missouri erred in holding that petitioners had not been deprived of their seniority property rights without due process of law, contrary to the guarantees of the Fifth Amendment of the Constitution of the United States, for the reason that:

(A) Such seniority rights of petitioners on the Pecos Division established in 1936 had been acted upon and recognized by respondent, and were arbitrarily and retroactively taken from petitioners without the knowledge of or notice to petitioners, thereby damaging petitioners through the loss of employment in the agreed amount of $7.525 to each and unfairly discriminating against petitioners.

This Court held in *Elgin, J. & E. Railway Co.* v. *Burley*, 325 U. S. 711, 65 S. C. 1282, l. c. 1299, that:

"Collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation, the Act clearly does not contemplate that the right saved may be nullified merely by agreement between the carrier and the union."

In such opinion, this Court said of collective bargaining that:

"It covers changing the terms of an existing agreement as well as making one in the first place, but it does not cover changing them with retroactive effects upon accrued rights or claims."

In *Steele* v. *L. & N. Ry. Company*, 323 U. S. 192, 65 S. C. 226, l. c. 230, 235, this Court says:

"If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading. * * *."

In the concurring opinion Justice Murphy states, l. c. 235:

> "* * * But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals."

It is pointed out in *Nord et al.* v. *Griffin*, 86 F. 2d 481, Certiorari Denied by this Court 300 U. S. 673, 57 S. C. 612, that "the rights of plaintiff are protected by the Fifth Amendment."

Applying the controlling law of these decisions to the instant case it becomes clear that the acts of respondent, erroneously sanctioned in the opinion of the Supreme Court of Missouri, retroactively destroys petitioners' property rights and violates the guarantees to petitioners afforded by the Fifth Amendment of the Constitution of the United States, without petitioners' consent or knowledge.

As indicated in the summary statement, Union's Local Chairman Eastham filed a grievance protest on behalf of Sellars, a fireman whose seniority date was junior to petitioners' (Rec. 101, 224, Ex. 22—Rec. 120), the filing of which was unknown to petitioners and they were not told thereof (Rec. 125, 207, 209, 224, 204, 205). Union's General Chairman Keiser pressed said protest (Rec. 122) and unknown to petitioners (Rec. 125, 207) a meeting to hear such grievance protest was peremptorily called and held on October 28, 1937 (Resp. Ans. Rec. 42, 43, 78), which was attended by said Local and General Chairmen and by J. E. Dyer for respondent's General Managers (Rec. 42, 43).

At such meeting an oral agreement was peremptorily reached (Ex. 39—Rec. 151, 229, 230, 298, 316, 317, 209, Ex. 29—Rec. 132, 133, 272), such agreement being to the effect that petitioners and others similarly situated who established seniority dates on respondent's Pecos Division between October 17, 1936, and October 28, 1937, would be treated as "borrowed" men under Schedule Article XVII and would have no recognition of such seniority by respondent, but from the date of such meeting seniority dates subsequently established under the same circumstances by firemen who rendered the same kind of service, would be recognized as having been established by "hired" men as had always been done prior to October 17, 1936. The excluded period of time began with petitioner Williams' seniority date on the Pecos Division, covered the seniority dates of all petitioners and destroyed their seniority rights on respondent's Pecos Division. This action was taken at said meeting notwithstanding the "recognized interpretation" made September 13, 1937 (Exs. 7-16—Rec. 109-117), and notwithstanding the fact that the meeting had been called to consider an entirely different matter, namely: the Sellars grievance protest which, by the provisions of paragraph 2 of Schedule Article II was *under* this "recognized interpretation" of the bargaining contract (Rec. 96) and not independent thereof.

None of the participants at this October 28, 1937, meeting saw fit to notify petitioners that their seniority rights were in jeopardy or that their seniority rights would or might be involved or destroyed at such meeting (Rec. 125, 207, 209, 204, 205, 237, 238). Respondent boldly admits that "no notice was given" petitioners and "there was no reason why they should have been notified" (Resp. Opening Statement, Rec. 78). None of the participants at the meeting saw fit to notify petitioners of the Sellars protest or of the action taken at the meeting of October 28, 1937,

but delegated to the roundhouse clerk the duty of notifying petitioners merely that their seniority dates had been taken from them (Rec. 125, 204, 205, 207, 209, 224, 237, 238). The action so taken thereat was taken subsequent to and notwithstanding the "recognized interpretation" dated September 13, 1937, to the effect that petitioners were "hired" men with established 1936 seniority dates (Exs. 14-15, Rec. 114-116) and notwithstanding the fact that prior to such meeting respondent had returned petitioners to service on the Pecos Division under their respective 1936 seniority dates in accordance with said "recognized interpretation" (Exs. 18, 20, 21—Rec. 118, 119, 199-204) and as an incident thereto had required petitioners to relinquish their long standing seniority rights on the Panhandle Division (Rec. 102, 103, 184, 185; Ex. 21—Rec. 119; Rec. 75).

In the face of this court's decisions in *Steele* v. *L. & N. Ry. Company* and *Elgin, J. & E. Ry. Company* v. *Burley,* cited *supra,* petitioners do not comprehend how the Supreme Court of Missouri could hold that petitioners were not retroactively deprived of a valuable property right without due process of law and were not discriminated against by the oral agreement (Rec. 209) made on October 28, 1937, which deprived only a limited group of firemen including the petitioners, of seniority rights established during a specifically limited period of time, on a single division of respondent's railway, with the application thereof limited to these firemen, when all other firemen who established seniority dates on the same division both prior and subsequent to this specifically limited period of time and who rendered the same service would not be deprived of their seniority dates so established on that specific division and would *not* be considered as "borrowed" men, as petitioners were as the result of the oral agreement, but instead such other firemen would be considered as "hired" men and would have "hired" men's seniority

rights. The effect of such oral agreement was special as to the individuals affected and the time involved, and special as to which division of respondent's railway was affected thereby. It discriminated between petitioners as firemen with seniority established during this specific period on this particular division and with all other firemen on said division who established their seniority dates thereon prior and subsequent to this specific period of time and also with all other firemen who established seniority dates on all other divisions of respondent railway under the same circumstances. Under the "recognized interpretation" all such firemen on all divisions were "hired" men with proper seniority rights as such, under the oral agreement of October 28, 1937, petitioners and others who established seniority rights on the Pecos Division during this specific period of time were "borrowed" men under Article XVII and their seniority rights were taken from them notwithstanding all other firemen on that same division doing the same work who established seniority rights thereon prior and subsequent to such period of time were "hired" men, *not* under Article XVII, and retained their seniority rights thereon in accordance with the "recognized interpretation." The oral agreement of October 28, 1937, violated Schedule Article XVIII(a) which required such agreements to be in writing (Rec. 98) and was a complete departure from petitioners' contract rights and the existing "schedule." The requirements of Article XVIII are worthy because such important matters as agreements affecting the seniority rights of railroad employees should be made permanent and fixed by writing and not left uncertain and open to dispute because oral. The "schedule" was not changed, amended or modified. It and the "recognized interpretation" were merely ignored for a specific purpose, namely: of retroactively taking away and destroying petitioners' seniority rights on the Pecos Division as desired

by Union's General and Local Chairmen, to please them and when this had been done said "Schedule" and "recognized interpretation" were immediately restored and all firemen prior and subsequent to the event again became "hired" men with accompanying seniority rights as always prior thereto, except petitioners, who were arbitrarily and discriminatorily doomed to be treated as "borrowed" men with no seniority rights since they had not elected to transfer within six months as required by Article XVII. Their status as "hired" men was not questioned until after the expiration of such six months period (Ex. 7—Rec. 109; Ex. 29—Rec. 132, 133, 272; Ex. 39—Rec. 151, 125, 229, 230, 298, 316, 317). The action at said meeting was retroactive. On October 28, 1937, the bargaining agent and respondent railway agreed to take from petitioners their seniority rights established in 1936 (Rec. 204, 205, 209, 320).

The oral agreement made at the October 28, 1937, meeting and the treatment accorded petitioners as the result of this oral agreement, was not in accordance with established railroad custom, usage and practice and there is no evidence showing such; on the contrary the record here is that railroad usage, custom and practice was to treat petitioners as "hired" men—*not* under Schedule Article XVII—who established seniority from their first run on the division (Exs. 8-16, Rec. 110-117).

Respondent contends (Opening Statement Rec. 76) that said oral agreement so made was "an interpretation" of the schedule. Petitioners reply that Schedule Article XVIII(a) required such to be written; that even if so then such alleged interpretation discriminated against petitioners in the manner hereinabove set forth and was unfair; that insofar as such alleged interpretation allowed other firemen seniority rights as "hired" men before and after the excluded time, it was nothing more but the same as the existing written "recognized interpreta-

tion." made September 13, 1937 (Exs. 15-16, Rec. 116, 117); that paragraph 2 of Schedule Article II requires a grievance to be "*under* the recognized interpretation" and the Sellars grievance protest filed September 29, 1937, could not have been under the alleged subsequent interpretation made October 28, 1937, and thus this grievance protest was *under* the "recognized interpretation" dated September 13, 1937, under which petitioners were "hired" men with 1936 seniority rights on the Pecos Division. It was because the Sellars grievance protest *under* said existing "recognized interpretation" could not be sustained, that Union's General and Local Chairman and respondent's General Managers did not act on this protest at the protest meeting held on October 28, 1937, but instead decided to take petitioners' 1936 seniority rights away—an entirely different matter. Insofar as such alleged oral interpretation because of the excluded period of time does not give petitioners the status of "hired" men with accompanying seniority rights, but decides they are "borrowed" men, it is in conflict with the aforesaid written "recognized interpretation," which gives petitioners the status of such "hired" men and decides they are *not* "borrowed" men and the alleged oral interpretation in no way repeals or mentions the written "recognized interpretation." Said oral agreement was no interpretation of the schedule and was of no effect because it effected a change in working conditions and a 30 day notice of such change was not given as required by the Railway Labor Act (45 U. S. C. A., Sec. 156) and as required by Schedule Article VII (Rec. 96). See *Order of Railroad Tel.* v. *Railway Exp. Agency*, 321 U. S. 342, 64 S. C. (4th Syl.); and *In re Chicago, North Shore & M. R. Co.*, 147 F. 2d 723. Respondent always knew and has contended all along that petitioners were "hired" men (Rec. 229, 230, 297, 298, 316, 317, 307), but notwithstand-

ing contends here that said oral agreement made at the October 28, 1937, meeting was an interpretation to the effect that petitioners were "borrowed" men on the Pecos Division.

(B) Such seniority rights of petitioners were destroyed and taken from petitioners at an informal meeting called on October 28, 1937, to hear the grievance protest of Paul Sellars, a third party fireman, which protest was not then or there determined, but instead petitioners' 1936 seniority rights on the Pecos Division were then and there taken from them retroactively without the knowledge of or notice to petitioners, without their being represented thereat and without representation or opportunity being afforded them to be heard in defense of their rights by an oral agreement which discriminated against petitioners.

In addition to ignoring petitioners' contract rights, retroactively changing and destroying such rights, and unfairly discriminating against petitioners, respondent undertook to do these things with the utmost secrecy and without notice to petitioners. This Court, in *Steele* v. *Louisville & N. R. Company,* 323 U. S. 192, 65 S. C. 226, l. c. 231, condemned such practice stating that the purposes of the Railway Labor Act "would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interest of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid."

In the companion case of *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210, 65 S. C. 235, this Court stated that plaintiff

> "alleges that the contract was signed and put into effect without notice to him or other negro members of

his craft and without opportunity for them to be heard with respect to its terms and that his protest and demands for relief to the railway and to the brotherhood have been unavailing * * *

We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood as bargaining representative is a Federal right implied from the statute and the policy which it has adopted. It is the Federal statute which condemns as unlawful the Brotherhood's conduct."

In *Nord* v. *Griffin*, 86 F. 2d 481, Cert. den. in this Court at 300 U. S. 673, 57 S. C. 612, the Court said:

"The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by the order of an administrative board in a proceeding to which he was not a party. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment."

It is said in *Illinois Central R. Co.* v. *Moore*, 112 F. 2d 959, l. c. 965 (5th Cir.), that:

"The collective agreement as such is made, defended and changed by the union, but the rights of each employee employed under it are his own and he may waive or accept them as he sees fit. *Piercy* v. *Louisville & N. R. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322."

The Illinois Central cited above and the Piercy case cited therein are the leading decisions on the principle that a bargaining agent may not give away, destroy or trade off the individual rights of petitioners and that such rights belong exclusively to the individual petitioners. How can the Brotherhood purport to take away or destroy petitioners' rights retroactively without advising them

thereof or asking whether they desired to waive such rights? Assuming, for argument, that the bargaining agent and respondent railway could take away or destroy these rights, could it do so without affording petitioners a hearing? Even though petitioners, when notified of the loss of their seniority, protested vigorously to the Brotherhood and executives of respondent Railway and to the National Railroad Adjustment Board as was done in the *Tunstall case*, cited *supra*, such protest procedure did not constitute due process to the petitioners when, at the inception, their seniority rights were taken from them and destroyed without their knowledge, without notice to them and without affording them a hearing. Can respondent retroactively take and destroy petitioners' seniority rights and thereafter tell the court with confidence and assurance that "no notice was given" the deprived employees and "there was no reason why they should have been notified" (Resp. Opening Statement, Rec. 78)? What prevents a bargaining agent from presenting a purported dispute with respect to an employee's seniority rights and then secretly agreeing with the employer to take away and destroy such rights if the employee is entitled to no notice and it is only necessary to tell him that his seniority has been taken away retroactively under a prior secret agreement?

(2) The Supreme Court of Missouri erred on a federal question of substance in its interpretation of the provisions of the Railway Labor Act, and in holding that petitioners as individuals having attempted to present their dispute and claim to the National Railroad Adjustment Board, which board refused to take jurisdiction, cannot now litigate the question or assert their rights in court.

The Supreme Court of Missouri was clearly in error in holding that by appealing from the retroactive agreement made at the meeting held on October 28, 1937, to the

Union's Executive Committee, petitioners admitted the jurisdiction of that committee to decide the question at issue. The protest procedure used at bar was present in *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 65 S. C. 235, where this court describes this protest procedure (l. c. 236) and in passing upon the effect thereof, states that such protest procedures "do not exclude the petitioners' cause of action from the consideration of the Federal courts." See also *Steele* v. *L. & N. Ry. Co.*, 323 U. S. 192, 65 S. Ct. 226, where this court (l. c. 229) describes similar protest procedure in that opinion (l. c. 233, par. 18) and points out that even though such protested disputes were heard by the National Railroad Adjustment Board, it did not exclude petitioners' cause from consideration by the courts.

The Supreme Court of Missouri was likewise in error in holding that petitioners having attempted to present their claim to the National Railway Adjustment Board, cannot now litigate the question in the courts. The Adjustment Board found that the parties to the bargaining contract (respondent and the Brotherhood) had reached an agreed decision on petitioners' seniority rights and held that there being no dispute between the parties to the bargaining contract, that it could hear no claims of individual employees not presented through the bargaining agent and closed its file. This action told petitioners that they were not parties to the collective bargaining agreement, even though beneficiaries thereof, and that since the parties thereto (respondent and the Brotherhood) had agreed upon the retroactive destruction of petitioners' rights, the Board would not take jurisdiction of petitioners' attempt to protect such property rights before such Board. The Supreme Court of Missouri by its ruling approved this position and adds that such retroactive taking of petitioners' seniority is but a part of the process of collective

bargaining, that there is nothing that petitioners may do, that the National Railroad Adjustment Board's refusal to take jurisdiction of petitioners' claim constitutes an adjudication thereof and precludes petitioners from seeking enforcement of such property rights in the courts. Such ruling does not comport with this court's decisions in the *Tunstall case,* cited *supra,* and in *Steele* v. *L. & N. Ry. Company,* 323 U. S. 192, 65 S. C. 226, l. c. 233, where this court says:

> "Even though the dispute between the railroad and petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the Union and causing the union to carry it through to the Board' (Citing). Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner, or that resort to such proceedings in order to secure a possible administrative remedy which is withheld or denied is prerequisite to relief in equity."

If the Board itself holds "no dispute therefor exists between the parties to said agreement," it holds that it has no jurisdiction to consider the dispute (Resp. Opening Statement, Rec. 78). With no jurisdiction, the Board's finding for or against petitioners would not be controlling, would not be an adjudication of petitioners' rights and would not prevent petitioners from litigating their claims in the courts. In Volume 2, Freeman on Judgments (5th Ed.), Page 1486, Section 704, the learned author states the rule thus: "Refusal to pass upon a particular matter for lack of jurisdiction is not an adjudication of it."

CONCLUSION.

Petitioners respectfully submit that the decision of the Supreme Court of Missouri is of grave importance and adversely affects the public interest; that it has the far reaching effect of permitting any brotherhood of railway employees and any railway or any other union and employer to collusively, secretly and retroactively destroy theretofore established seniority of any employee, and to discriminate unfairly between employees; that it has the far reaching effect of making a refusal of jurisdiction by the National Railroad Adjustment Board in a grievance dispute presented by an individual employee not a party to the bargaining contract, a binding adjudication upon the employee and of making such refusal to take jurisdiction thereof, the equivalent of a denial of the right to seek enforcement of individual property rights in the courts, when all that such Board actually decided was that it had no jurisdiction of the matter, and in fact adjudicated nothing with respect to the merits.

We submit that petitioners' property rights have been destroyed retroactively in violation of the guarantees of the Fifth Amendment of the Constitution of the United States; that such property rights have been taken from petitioners without due process, notice or opportunity to be heard; that a Federal question of substance involving the Railway Labor Act, a Federal statute, as mentioned *supra*, has been wrongly decided and misinterpreted by the Supreme Court of Missouri in a way not in accord with applicable decisions of this Court.

We therefore, respectfully urge this Court to grant the petition herein so that petitioners will not be deprived of their valuable property rights and of the right

to have the far reaching and important matters involved in this case adjudicated by this Court.

Respectfully submitted,

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 512.

ELDON WILLIAMS, PETITIONER,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, RESPONDENT.

No. 513.

FRANK E. THOMAS, PETITIONER,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, RESPONDENT.

No. 514.

ERVIS S. NEIS, PETITIONER,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, RESPONDENT.

BRIEF OF RESPONDENT, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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THE DECISION BELOW.

The decision of the Supreme Court of the State of Missouri affirming the judgment of the Circuit Court of

Jackson County, Missouri, for respondent, became final October 13, 1947, and is reported as *Williams et al.* v. *The Atchison, Topeka and Santa Fe Railway Company,* 204 S. W. 2d 693 (not yet officially reported in Missouri Reports).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The "challenges" posed by the petitioner in his summary statement will be fitted into the factual background produced by the evidence in the case, and so viewed will expose their own fallacies.

Petitioner admits the necessity of an interpretation of the collective bargaining agreement between the Brotherhood of Locomotive Firemen and Enginemen and the respondent railroad, hereafter called the Schedule, under which he derived his seniority rights and admits the right of the Brotherhood as the collective bargaining agent to represent him in making the interpretation. He questions neither the necessity for the interpretation nor the authority of the bargaining agent, but questions the method of making the interpretation. He does not charge fraud and has submitted no evidence of arbitrary or discriminatory action. On the contrary, the undisputed evidence shows that the interpretation was made as provided in the Schedule upon which petitioner relies for the creation of his seniority rights, that it was made, as therein provided, by the duly elected and appointed representatives of the carrier and the Brotherhood of Locomotive Firemen and Enginemen in accordance with the authority granted by the Constitution of said Brotherhood, and that petitioner was a member of that organization.

Petitioner twice submitted his claim to the National Railroad Adjustment Board (R. 138-140 and 170-181), and that Board on March 1, 1939, ruled that petitioner's claim

had been handled in accordance with the procedure in said agreement (the Schedule) and an agreed decision reached on the claims which disposed of the case in accordance with said agreement, "It is held that no dispute, therefore, exists between the parties to said agreement" (R. 140-141), and reaffirmed its ruling on March 4, 1940 (R. 147-148). The Board, therefore, had jurisdiction of the petitioner's claim, which it exercised in holding that under the facts submitted by petitioner, no dispute existed.

THE QUESTION PRESENTED.

The petition for writ of certiorari contains no statement of the questions presented as required by Rule 38, paragraph 2. Respondent conceives the question to be whether an interpretation of the Schedule in the manner therein provided made by the carrier and the representatives of the bargaining agent acting within the scope of the authority conferred by the Constitution thereof under the facts and circumstances of this case applying the provisions of the Schedule to the seniority status of a group of the class represented by the bargaining agent is binding upon the individual members.

STATEMENT OF THE CASE.

In 1925, respondent entered into an agreement with the Brotherhood of Locomotive Firemen and Enginemen, hereafter referred to as the Brotherhood, which was the recognized collective bargaining agent of all locomotive firemen employed by respondent. This contract is entitled "Schedule of Rates, Rules and Regulations for Locomotive Firemen." Pertinent parts of this Schedule are set out in pages 95 to 99 of the Record and include Article II, which states that the General Committee of the Brother-

hood will represent all locomotive firemen in the making of contracts and interpretations thereof. The Schedule contains the provisions giving rise to seniority rights, whether permanent or temporary (R. 94-99).

Petitioner was a member of the Brotherhood (R. 2 and 27-28). The pertinent provisions of the Constitution of that organization are set out on pages 99 and 100 of the Record and include a provision giving the General Grievance Committee authority to make and interpret agreements with representatives of railway companies concerning rates or wages, rules respecting seniority rights, adjustments of grievances, and other matters necessary in the interest of the members they represent. This provision also gives the General Chairman authority to interpret the Schedule when the General Grievance Committee is not in session.

Petitioner in October of 1936 was in respondent's employ as a fireman on the Panhandle Division (R. 102-3). He was not in active service at that time and during the course of the month, October 17, 1936, he went to work as a fireman on the Pecos Division (R. 104). At that time, he was a borrowed man, as found from all the evidence by the trial court (R. 324), in accordance with the meaning of Article XVII of the Schedule (R. 98).

Petitioner remained in service on the Pecos Division until January 15, 1937 (R. 104), at which time he was granted a leave of absence. While he was on leave of absence, he was cut off the Pecos Division board and seniority roster, on March 12, 1937 (R. 105). He made no request for transfer to the Pecos Division (R. 134). He returned to work on the Panhandle Division and later returned to the Pecos Division, where he went to work on September 29, 1937. At that time, he was placed on the board with a seniority date of October 17, 1936 (R. 119). The placing of petitioner on the board in this manner put him ahead of

firemen whose seniority dates were subsequent to October 17, 1936, and who had elected to remain permanently on the Pecos Division in accordance with Article XVII of the Schedule, and put him ahead of firemen who had been hired on the Pecos Division between the dates of June 1, 1937, and September 29, 1937 (R. 119, 105-108).

This placing of petitioner's name on the board displaced Fireman Paul Sellers, whose seniority date was June 30, 1937, because the number of names that could be carried on the board was limited by the amount of work available (R. 120).

The Local Chairman of petitioner's collective bargaining agent complained that this act was causing much disturbance among the men and protested against such an interpretation of the Schedule as would place Williams' name on the board with the October 17, 1936, seniority date, not only because Williams had knowingly failed to comply with the rule of the Schedule requiring him to file application for transfer within the six months' period as provided in Article XVII, but also because such an interpretation would require the recalling of about 20 other members of Williams' group and the placing of all of these men on the roster ahead of men who had been hired in June of 1937 (R. 120, 121). As a result of this protest and a letter from the General Chairman relating to the application of Article XVII of the Schedule to members of the petitioner's group (R. 122-125), a meeting was held in the General Manager's office of respondent railroad in Amarillo, Texas, on October 28, 1937 (R. 125).

Back in 1931 the Brotherhood had made a formal request that firemen who were cut off the lists on divisions of the respondent's railroad be permitted to accept service on any division where firemen were needed before new men were hired. The carrier in response to this request agreed that it would continue its practice of calling on

neighboring divisions for men who might be laid off in force reduction prior to employing firemen from the outside (R. 131-132). This request was renewed by the General Chairman in July, 1936, in a letter calling attention to the fact that all furloughed firemen had been called back into service on the Pecos Division, but that there were a large number of furloughed firemen on the Panhandle Division and stating it would be appreciated if the carrier would arrange to transfer furloughed men from other divisions before employing new men on any division. This request was passed on by the carrier's General Manager to the Mechanical Superintendents (R. 101-102).

An exchange of correspondence between the carrier and the General Chairman (Exhibits 7-16, R. 109-117) from May through September of 1937 shows that there had been considerable confusion as to the handling of firemen who were employed on one division of the railroad and were in service on another division—the railroad contending that such men were hired men on both divisions and entitled to permanent seniority rights on both divisions until they would be called for service on both divisions at the same time. The position of the General Chairman was that such men were borrowed or transferred men within the meaning of Article XVII of the Schedule and that they were entitled to only temporary seniority rights for a period of six months on the division to which they were so transferred and in service, unless within that period they elected to remain permanently on that division and released their rights on their home division. When the meeting was held at Amarillo, the Brotherhood was still contending that Article XVII was the only provision applicable to this situation (R. 122-125).

J. E. Dyer, the authorized representative of respondent, was present at the Amarillo meeting for respondent; W. C. Keiser, General Chairman of the General Grievance

Committee, and C. J. Eastham, Chairman of the Grievance Committee of the Local Lodge, were present as authorized representatives of the Brotherhood (R. 125). At this meeting, the rights of petitioner and fifty-two other firemen who were or had been on the Pecos Division (R. 105-108) were considered.

At the time of the holding of this meeting there were thirteen firemen in service on the Pecos Division who had come to that Division from other Divisions of the respondent's railroad and who had relinquished their seniority rights on their home Divisions by electing to remain permanently on the Pecos Division in accordance with the provisions of Article 17, and they therefore had no seniority rights except those on the Pecos Division. There were also twenty-one men who had been employed on the Pecos Division during the period from June 1, 1937, to October 28, 1937, who had seniority rights on that Division and on no other. Also, at this time there were eighteen men who had come to the Pecos Division from other Divisions of the Respondent's railroad, and after working on the Pecos Division had not elected to remain on that Division but had returned to their home Divisions. The names and seniority dates of all these men are set out on pages 105-108 of the Record.

The interpretation made at the Amarillo meeting was that the provisions of Article XVII were applicable to those firemen who had come from other divisions of respondent's railroad to and had been in service on the Pecos Division and that these men, as a result of such service on the Pecos Division, had only temporary seniority rights in the absence of the filing of an election to transfer permanently within the six months' period from the date of their first service (R. 132). The effect of this interpretation was that only those firemen who had come to the Pecos Division from other divisions and had elected to permanently trans-

fer to the Pecos Division as required by Article XVII acquired permanent seniority rights on that division. Those in petitioner's group which had not so elected had acquired only the temporary rights.

It was agreed that in the future, firemen would be permitted to establish permaner seniority rights on two or more divisions under Article XI of the Schedule and retain such rights until such time as they might be called for service on two or more divisions at the same time, in which event they would be required to elect between the respective divisions.

Petitioner appealed to the Executive Committee of the Brotherhood from the action taken at the Amarillo meeting; and on March 18, 1938, the said Executive Committee sustained said action (R. 128).

Petitioner then appealed to the President of the Brotherhood, who assigned the matter to Vice President H. M. Van Sant, who conducted a formal hearing at Wichita, Kansas, on October 18, 1938, at which petitioner was present as well as other members and officials of the Brotherhood. After a full hearing, the President of the Brotherhood affirmed the decision of the Executive Committee and denied petitioner's appeal (R. 128-135).

Thereafter, on February 13, 1939, petitioner filed a claim with the First Division of the National Railroad Adjustment Board. From the facts set forth in said claim, the Board held that the matter had been handled in accordance with the Schedule and that no dispute existed. On January 29, 1940, petitioner filed a second claim, based upon the same facts, with the same Board, which resulted in the same ruling (R. 138-148).

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

I.

No substantial question is presented respecting the correctness of the decision below.

Petitioner admits the necessity of an interpretation of the Schedule between the Brotherhood and the respondent railroad, under which he derived his seniority rights and admits the right of the Brotherhood as the collective bargaining agent to represent him in making the interpretation. He questions neither the necessity for the interpretation nor the authority of the bargaining agent, but questions the method of making the interpretation. He does not charge fraud and has submitted no evidence of arbitrary or discriminatory action. On the contrary, the undisputed evidence shows that the interpretation was made as provided in the Schedule upon which petitioner relies for the creation of his seniority rights, that it was made, as therein provided, by the duly elected and appointed representatives of the carrier and the Brotherhood in accordance with the authority granted by the Constitution of said Brotherhood, and that petitioner was a member of the Brotherhood.

Respondent's answer to petitioner's contention that the exchange of correspondence between the carrier and the General Chairman resulted in a "recognized interpretation" of the Schedule.

Petitioner contends that there was an interpretation of the Schedule during an exchange of correspondence be-

tween the carrier and the General Chairman of the bargaining agent between May and September of 1937, and he relies particularly upon a letter written by the General Chairman September 8, 1937 (R. 115-116). Petitioner calls this a "recognized interpretation" of the Schedule, and says that as a result of this "recognized interpretation" he established permanent seniority rights on the Pecos Division from October 17, 1936. Respondent contends that this exchange of correspondence did not constitute an interpretation because there was no definite unqualified agreement, and insists that the Schedule was not interpreted and applied except at the meeting held in Amarillo, Texas, on October 28, 1937, between the representative of the General Manager of the carrier and the General and Local Chairmen of the bargaining agent.

Petitioner attacks the interpretation made at the Amarillo meeting on the grounds (1) that the representatives of the bargaining agent had no authority to represent him for the purpose of interpreting the Schedule, (2) that petitioner had no notice of the meeting, and (3) that the interpretation was retroactive. It is apparent that any and all of these contentions apply with equal force to the "recognized interpretation" relied on by petitioner; that is, this so-called "recognized interpretation," which is the foundation of petitioner's arguments for the granting of certiorari, was made by the same General Chairman acting for the Firemen, was made without notice to or knowledge of petitioner, and was made more than ten months after it was to have been effective.

It is undeniable, therefore, that petitioner admits the necessity of the interpretation of the Schedule to determine which provisions thereof were applicable to his group, and it is equally undeniable that he admits the authority of the General Chairman and of the bargaining agent to represent him in making an interpretation and that such an inter-

pretation is valid without notice to him, and is valid when given a "retroactive" application. Petitioner, by advancing the "recognized interpretation" theory, has himself destroyed his arguments against the validity of the interpretation made at the Amarillo meeting.

The Court will see from this that all petitioner's "challenges" concerning the "right, power, and authority of a Union bargaining agent" set forth in paragraphs (a) to (f) at pages 2 to 4 of the petition, have no substance whatever, and that while petitioner says he is challenging such right, power, and authority, he is in reality attempting to rely on them.

The "recognized interpretation" contended for by petitioner was non-existent because there never was an interpretation between the carrier and the bargaining agent until the meeting at Amarillo. What is the meaning of "recognized interpretation"? It is one that has been definitely and conclusively agreed upon and is plainly understood by all parties. It is something as to which there is only one point of view.

The Court will note that Keiser did not say, as a final summing up of the correspondence referred to by petitioner, that he was willing to go along with the interpretation which he had continually been resisting. What he said was that he was willing to go along if * * *. His willingness was conditioned upon the assumption that the matter in controversy could and would be adjusted in the manner described in his letter dated September 8, 1937 (R. 116), and in his letter of October 19, 1937 (R. 122-125), he pointed out that the condition in his letter of September 8 could not be fulfilled and that Article XVII was the only Schedule provision applicable.

Petitioner has isolated a part of Keiser's letter of September 8 from its context and is asking the Court to ignore the essential parts of the controversy involving the

53 firemen and to accept as a "recognized interpretation" something which was stated as conditional upon a proper adjustment of the whole controversy. Since there was a complete failure of the condition which Keiser attached to his remark, the Supreme Court of Missouri was unquestionably right in rejecting petitioner's contention that it was a "recognized interpretation."

Nothing was done or said by Keiser in furtherance of this correspondence except what denoted his unwillingness to accept anything but a straight application of Article XVII to the entire group of firemen involved in the dispute. Nothing was done by Keiser to evidence petitioner's contention that this correspondence is entitled to be regarded as a "recognized interpretation." On the contrary, what was done by him, following this exchange of correspondence, completely negatives any intention on his part to recede from the position he had been maintaining. Sellers' grievance was only an incident or an instrument which shaped up and brought into focus the entire controversy over the respective rights of 53 firemen who had gone to work on the Pecos Division.

The Petitioner would have the Court consider a fragment of Keiser's letter as a "recognized interpretation" of the Schedule. Keiser's inconclusive and temporary submission to what in the same letter he protested against was less entitled to be considered as a "recognized interpretation" than would a payment under protest to be regarded as an acknowledgment of a debt.

The only interpretation of the Schedule was made at the Amarillo meeting in October, 1937.

Article II of the Schedule provides for interpretation of its provisions by the General Committee of the Brotherhood. It states:

"The General Committee of the Brotherhood of Locomotive Firemen and Enginemen will represent all locomotive firemen in the making of contracts governing rates, rules and working conditions and interpretations thereof.

"The right of any engineer or fireman to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the General Committee making the same is conceded" (R. 95-96).

It was recognized at the time the agreement was entered into that it would not automatically fit any and all situations which might arise, and that interpretations must be made from time to time, and the persons to make such interpretations were designated.

Not only was the necessity for such interpretations recognized by the Brotherhood and respondent at the time of making the agreement, but it was also recognized in the constitution of the Brotherhood. Portions of this constitution from the revision of January 1, 1932, are set out on pages 99 to 100 of the Record and include the following:

"Sec. 8. (a) General grievance committees shall have authority to make and interpret agreements with representatives of railway companies concerning rates of wages, rules respecting seniority rights, adjustments of grievances and other matters necessary in the interest of the members they represent. When the general grievance committee is not in session, the general chairman has authority to interpret the schedule.

"(b) General grievance committees shall have authority on their respective lines to regulate the mileage of firemen in accordance with the policy of

the organization and shall also have complete jurisdiction over all matters of seniority and assignment to runs.

"(c) All rules, regulations, contracts and agreements agreed upon by officials of a railway company, and a general grievance committee or/its representatives, shall be binding upon all members working within the jurisdiction of the committee."

Petitioner charges that Keiser, admittedly General Chairman of the Brotherhood, and C. J. Eastham, admittedly Chairman of the Grievance Committee of the Local Lodge of that organization at Clovis, New Mexico (the headquarters of the Pecos Division) (R. 125), were not authorized to represent him at the Amarillo meeting, at which time Eastham and Keiser met with Dyer, admittedly the authorized representative of respondent. From the foregoing quotations from the Schedule and the Constitution of the Brotherhood, it is apparent that petitioner's contention is entirely erroneous. Petitioner as a member of the Brotherhood cannot claim that he is not bound by the provisions of its Constitution. The Schedule provides that all firemen in respondent's employ shall be represented in the making and interpreting of the Schedule by the General Grievance Committee, and the Constitution of the Brotherhood provides that when the General Grievance Committee is not in session the General Chairman shall have authority to interpret the Collective Bargaining Agreement. Keiser, therefore, did have actual express authority to represent and did represent all of the firemen in respondent's employ, and particularly those involved in the controversy, at the time he met with Dyer in the General Manager's office at Amarillo on October 28, 1937.

In the case of *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 327 U. S. 661, this court considered the question of authority and in its first opinion at page 738 said:

> "Authority might be conferred in whatever ways would be sufficient according to generally accepted or 'common law' rules for the creation of an agency, as conceivably by specific authorization given orally or in writing to settle each grievance, by general authority given to settle such grievances as might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlements."

In its second opinion, 327 U. S. 661, at page 663, the Court said:

> "Furthermore, so far as Union members are concerned * * * it is altogether possible for the Union to secure authority in these respects within well established rules relating to unincorporated organizations and their relations with their members by appropriate provisions in their by-laws, constitution, or other governing regulations, as well as by usage or custom."

Petitioner's claim that Article XVIII (R. 98-99) of the Schedule was not complied with in that no written statement of the questions at issue was submitted to the General Manager. We deny petitioner's right to question compliance with this article, but this is immaterial since the Article was complied with by Exhibit 24 (R. 122-125).

Petitioner also contends that the interpretation reached at the Amarillo meeting was invalid because it was not reduced to writing and refer to Article XVIII of the Schedule. There is nothing in this article or elsewhere which has any application to the form in which such a determination is to be rendered.

At the time of the holding of this meeting there were thirteen firemen in service on the Pecos Division who had come to that Division from other Divisions of the respondent's railroad and who had relinquished their seniority rights on their home Divisions by electing to remain permanently on the Pecos Division in accordance with the provisions of Article 17 of the Schedule, and they therefore had no seniority rights except those on the Pecos Division. There were also twenty-one men who had been employed on the Pecos Division during the period from June 1, 1937, to October 28, 1937, who had seniority rights on that Division and on no other. Also, at this time there were eighteen men who had come to the Pecos Division from other Divisions of the respondent's railroad, and after working on the Pecos Division had not elected to remain on that Division but had returned to their home Divisions. The names and dates of all these men are set out on pages 105-108 of the Record.

At this meeting it was agreed that all these men should be handled in accordance with Article XVII of the Schedule; but that, after the date of the meeting, it would be considered that furloughed firemen who accepted service on any other Division than their home Division would be considered as hired men (meaning that they could hold seniority rights on two or more Divisions so long as there was no conflict, that is, so long as they were not called for service on two Divisions at the same time) (Ex. 29, R. 128). Petitioner as well as all other firemen from other Divisions who had not elected to permanently transfer to Pecos Division while working there in 1936 and 1937, were given dates as of their first service the last time they went to work on the Pecos Division, and were also permitted to hold their original seniority dates on their Home Divisions until such time as there might be a conflict. All those firemen who had, within the

six-months' period, elected to transfer permanently to the Pecos Division were given their original dates on the Pecos Division but lost their seniority rights on their home Division (Ex. 29, R. 128-135).

That this interpretation of the Schedule was reasonable and not arbitrary or discriminatory is most clearly shown by considering the effect of a different method of handling. Either these men had to be handled by applying Article XVII of the Schedule or some new agreement had to be made. Let us suppose that these representatives at this meeting in Amarillo had disregarded Article XVII. Eleven men (R. 106) had relinquished their seniority rights on the Slaton Division and had accepted permanent seniority rights on the Pecos Division. If Article XVII had not been applied, these men who had acted in reliance upon it would have lost their seniority rights on the Pecos Division; and if, in some manner, their rights on the Slaton Division could have been restored to them, such restoration would have affected all the firemen on the Slaton Division roster. The same applies to the man from the Panhandle Division and the man from the Western Division, who had so elected to remain permanently on the Pecos Division (R. 106). In other words, thirteen men would have lost permanent seniority rights on the Pecos Division which they had acquired by acting in accordance with Article XVII, and, if in some way their rights on their home Divisions could have been restored to them, the seniority rights of all of the firemen on three other Divisions would have been disturbed by these men being sent back.

If petitioner has a right to have his original date of October 17, 1936, then the other eighteen men set out on pages 107-8 of the Record have the same rights. Assuming that all these men had been given these rights, it is apparent that there would have been a conflict be-

tween these men and the list of twenty-one men (R. 106-7) who were hired on the Pecos Division (and had no rights on any other Division), after June 1, 1937. Presumably, therefore, the men in the first list of eighteen men would have gotten some sort of seniority status on the Pecos Division, and maybe their rights on their home Divisions could have been retained and maybe not. But, in any event, there would have been great conflict between the men on the Pecos Division in these three separate groups as to who had what rights. Clearly, the eighteen men who had not elected to remain would have been entitled to prior seniority dates to the twenty-one men who had been hired after June 1, 1937. This would have worked a great injustice to these latter men. In other words, where all these fifty-three men had been handled and treated for a period of more than a year on the Pecos Division in accordance with the provisions of Article XVII, it would not have been practicable if possible, to have handled the matter in any other way than the way in which it was handled.

Therefore, the interpretation which was made was the only one which could have been made without creating confusion and conflicts among the seniority rights of so many men that it could never have been straightened out. Petitioner loses sight of the fact that he is asking this Court to say that his wishes, and his alone, should be considered and that the rights of these other fifty-two men should have been completely disregarded.

However, the fact that the action taken at Amarillo was not one hundred per cent favorable to the group of which petitioner was a member in no way implies that it was arbitrary or unfair. This action was not the making of a new agreement nor was it for the purpose of getting rid of the petitioner, as he contends. It was merely the application of the provisions of the contract under which

all these men had worked for many years, as required by the provisions of that contract. To have reached any other decision, it would have been necessary to go outside the terms of the collective agreement; and, if this had been done, there might be a legitimate complaint that the decision was arbitrary and contrary to law.

The only new agreement made at the Amarillo meeting was that in the future firemen could hold seniority rights on more than one Division of the Railroad at the same time. Such an agreement, of course, is entirely in accord with the Railway Labor Act and the established law but has no bearing on the issues in the present case. All that was done at that meeting, so far as the issue in this case is concerned, was to apply the provisions of the Schedule.

The provisions of the Schedule show that no rights were taken from the petitioner by the action of this meeting. Under the agreed interpretation and application of the Schedule, the petitioner had acquired no rights under that Schedule which could have been taken from him because, when he went to work on the Pecos Division in 1936 the only right which he acquired was to work on that Division with a seniority date of October 17, 1936, for a period of six months, unless within that time he elected in writing to relinquish his rights on the Panhandle Division and remain permanently on the Pecos Division. This he admits he did not do (R. 134). He, therefore, had no right to a seniority date of October 17, 1936, on the Pecos Division which could have been taken from him at that meeting, because no such right existed.

All of petitioner's contentions have been presented to and considered by the Trial Court and the Supreme Court of Missouri. The Trial Court, after considering all of the facts pertaining to the interpretation made at the Amarillo meeting, said (R. 324):

"Therefore, the matter determined at the Amarillo meeting and appealed by plaintiff to the Executive Committee of the Brotherhood on December 14th and thereafter appealed from the Executive Committee to the President of the Brotherhood did not constitute a grievance affecting the private or individual right of plaintiff but was an act within the jurisdiction of the authorities in interpreting generally the seniority rights not of plaintiff but of a group under a given set of facts.

"As to the question of notice, plaintiff received notice of the action taken at Amarillo and personally presented his view of the proper construction of the rules touching seniority to the Executive Committee of the Brotherhood and later to the President of the Brotherhood, and in the absence of a showing of bad faith, improper conduct, or failure to properly perform the duties on the part of the representatives of the Brotherhood, their finding as to the seniority rights of the group involved should not be disturbed by the court."

The Supreme Court of Missouri, after considering all the points which petitioner has presented to this Court, said:

"Williams contends that he has been deprived of a valuable right without due process of law. We may concede that a seniority status is a property right, but we do not concede that Williams was deprived of any such right. The decision made merely established what right he had." 204 S. W. 2d 693, at page 696.

II.

Petitioner twice submitted his claim to the National Railroad Adjustment Board (R. 138-140 and 170-181) **and that Board on March 1, 1939, ruled that petitioner's claim had been handled in accordance with the procedure in said agreement (the Schedule) and an agreed decision reached on the claims which disposed of the case in accordance with said agreement, "It is held that no dispute, therefore, exists between the parties to said agreement"** (R. 141), **and reaffirmed its ruling on March 4, 1940** (R. 147-148). **The Board, therefore, had jurisdiction of the petitioner's claim which it exercised in holding that under the facts submitted by petitioner, no dispute existed.**

Since it is apparent from the foregoing that petitioner has not been deprived of any rights without due process of law, we deem it unnecessary to review the authorities supporting the conclusiveness of the determination by the National Railroad Adjustment Board in the claim brought by petitioner himself that no dispute existed between the parties.

CONCLUSION.

The decision of the Supreme Court of Missouri was so clearly right as to leave no question for this Court's review and no reason for the granting for a writ of certiorari. The Missouri Supreme Court decided no Federal question, substantial or otherwise, in a way probably in conflict with the applicable decisions of this Court, but on the contrary followed and quoted from the only applicable decision, that of *Elgin, Joliet & Eastern R. Co.* v. *Burley*. No rights were taken from petitioner without due process of law, and in fact no rights were taken from him at all. The opinion of

the Trial Court and of the Supreme Court of Missouri show conclusively that petitioner's rights were not changed, but were merely established by the interpretation made by the authorized parties.

Respondent prays that the writ be denied.

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